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Cc: []
From: CN=Karen Schwinn/OU=R9/O=USEPA/C=US
Sent: Tue 12/7/2010 6:31:37 AM
Subject: Fw: Status Update - EPA comments

fyi, if you guys want to follow the evaluation of this document - Tom did the bulk of this review tonight

----- Forwarded by Karen Schwinn/R9/USEPA/US on 12/06/2010 10:30 PM -----

From: Karen Schwinn/R9/USEPA/US
To: [REDACTED] **CEQ email**, Letty_Belin@ios.doi.gov
Cc: DAVID_Nawi@ios.doi.gov, [REDACTED] **CEQ email**, Tom Hagler/R9/USEPA/US@EPA, Roger Gorke/DC/USEPA/US@EPA
Date: 12/06/2010 10:29 PM
Subject: Status Update - EPA comments

Erika and Letty -

Thank you for all the redrafting you did (obviously over the weekend.) EPA believes that you have adequately addressed the significant concerns we raised in our previous emails and we do not have any major problems with this draft.

We note especially that (a) most of our specific comments were incorporated, and (b) although you did not take our organizational suggestion on the "Core Elements", we believe that the caveats and explanation of federal authorities added elsewhere in the document, along with the revisions in Core Elements, removes the "predecisional" issues we had raised.

Also, thank you for adding the new Water Quality paragraph (page 12). It raises the issue, notes the difficulties of conflicting goals, and commits to work on them. We also appreciate the new paragraph on the Delta Stewardship Council (page 13). We think this opens the door for a more productive relationship with this new state agency.

We do offer these largely editorial comments:

(a) There was a note in the footnote on page 6 to add a reference to EPA. We are concerned that the footnote and the paragraph above it does not give a complete picture of the different state and federal agency roles, especially the critical ESA roles. We are offering the following rewrite of that long paragraph (and the two related long footnotes). Tom Hagler and David Nawi spoke about this afternoon and hopefully this reflects that discussion and maybe shortens it:

"Although Federal agencies work closely with the State and other stakeholders to advance a successful BDCP proposal, State and Federal agencies play very different roles in support of the BDCP. The BDCP is a State-proposed plan; the State's Department of Water Resources (DWR), owner and operator of the State Water Project (SWP), is currently anticipated to be the permit applicant for the BDCP. The Federal Bureau of Reclamation, as owner and operator of the Central Valley Project (CVP) works closely with the State's DWR, but is not a permit applicant. The Federal regulatory agencies also have multiple roles in this process. Most notably, at the outset the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) must conclude that the final BDCP meets the requirements for a Habitat Conservation Plan (HCP) under the Federal Endangered Species Act. Furthermore, the USFWS, NMFS and the Bureau are also co-leads of the environmental review of the BDCP, which will give rise to an

Environmental Impact Statement/Environmental Impact Report (EIS/EIR) under the Federal National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA).

Once the BDCP is approved, other federal regulatory agencies may also be called upon to evaluate and, if appropriate, issue permits for implementation of various elements of the BDCP. For example, the U.S. Army Corps of Engineers will most likely need to issue permits under the Rivers and Harbors Act for activities that may affect the course, condition or capacity of navigable waters ("Section 10" permits) and/or permits allowing modification of existing Corps projects ("Section 408"). Similarly, the Corps and U.S. Environmental Protection Agency (EPA) have regulatory obligations in the issuance of Clean Water Act Section 404 permits for discharge of dredge or fill material in waters of the United States.

All Federal regulatory agencies that will make or participate in determinations on any aspects of the BDCP or its subsequent implementation must necessarily have some separation from the BDCP planning process so that they can approach their regulatory obligations in an independent and science-based manner. [Insert Footnote: Accordingly, the views of Federal agencies expressed in this report are preliminary and subject to change as new information becomes available. They are not "decisions" or "final decisions" of the agencies and should not be so construed. Furthermore, a number of federal agencies have formal regulatory review and permitting authorities associated with numerous actions encompassed by the BDCP and specific criteria by which to exercise those authorities. At this juncture in the planning process, no decisions have or can be made on the outcome of those regulatory reviews. All of the representations in this report must be understood are very preliminary and are not intended to prejudice the outcome of those reviews.] Therefore, while the Federal agencies take this opportunity to underscore their commitment to a successful and legally sufficient BDCP, and to set forth the principles that guide this commitment, they also will remain steadfast in meeting their obligation to ensure that the BDCP will meet the requirements of all Federal laws."

(b) Page 7, the missing legislation citation: The "dual goals" came from the 2009 special session package of bills that had no overall catchy title. The best reference to the dual goals is by their codified section, which is "California Water Code Section 85054."

(c) Page 14, last sentence of section 4 on the EIS/EIR process: The paragraph discusses only the NEPA compliance for the BDCP, but this last sentence makes an optimistic anticipation of completing "environmental compliance and permitting" by late 2012. That seems much broader, and may arguably include Corps NEPA for 404 permits, SWRCB CEQA for changes in the water quality control plan, maybe even the state-required change in point of diversion SWRCB action. Those last three almost certainly will NOT be done by late 2012. What is the intention here? Our suggestion is to "anticipate" completing only the BDCP EIS process by 2012, and not all the other regulatory actions that must occur during the implementation process. This would mean deleting "and permitting" at the end of the paragraph.

(d) Page 14, section 2 refers both to IEP and the Collaborative Science Center. There are actually 9 agencies that make up IEP, but only 5 are listed here. The ones not listed are EPA, NOAA-Fisheries, the Corps and the State Water Board. I assume that the agencies listed are the ones that are to be part of the Science Center. It'd be accurate to say "The Collaborative Science Center will house several of the agencies that are part of the IEP....." (and not list any agency specifically)

Again, thanks for your responsiveness to our concerns. - Karen